

**Ancor Concepts, Inc. and Amalgamated Industrial Union, Local 76B, International Union of Electrical Workers, AFL-CIO. Case 2-CA-24754**

May 20, 1997

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On December 7, 1992, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order.

The judge, citing *Harter Equipment (Harter I)*,<sup>2</sup> found that the Respondent engaged in a lawful lockout in support of its bargaining position and that its hiring of temporary replacements was not motivated by union animus. The judge therefore concluded that the Respondent had no obligation to reinstate its striking employees upon their unconditional offer to return to work.

We find merit in the General Counsel's exception to the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate the striking employees. On the facts before us, as discussed in full below, we find that following its initial declaration of a lockout, the Respondent engaged in conduct inconsistent with a lawful lockout by telling the Union that the replacements were permanent employees and that the strikers would be placed on a preferential recall list if the Union so desired. The Respondent's assertion rendered the lockout unlawful, so that the Respondent was no longer privileged to invoke *Harter* to justify its continuing failure to reinstate strikers who had made unconditional offers to return to work.

**1. Facts**

The Respondent manufactures custom furniture. Martini, the Respondent's president and owner, formed the company in March 1990.<sup>3</sup> From 1970 until 1990,

the Union was the exclusive collective-bargaining representative of the predecessor corporations' production and maintenance employees.<sup>4</sup> Prior to the Respondent's formation, Martini was a member of the furniture industry's Manufacturers Association and served on the Association's board that negotiated with the Union. Union Business Agent DeSilva testified that Martini never displayed antiunion sentiment or hostility.

The Respondent adopted, with modifications, the Association's contract which was to expire on August 31,<sup>5</sup> but opted to bargain on an individual basis for a successor agreement. Martini met with union representatives three times in August. After the last meeting, the only unresolved issues were the Union's proposed additional sick day and wage increase, and the Respondent's position that it could not afford an increase and its counterproposal for a 6-month wage freeze. The judge, crediting DeSilva, found that the parties did not reach agreement on those issues by the end of August when the Association's contract expired. At a September 20 meeting attended by Union President Carrion and the new business agent, Pietri, Martini repeated that the Respondent could not afford to give a wage increase and needed a 6-month wage freeze. The union representatives reported the results of the meeting to its members, who voted to strike.

All six of the Respondent's unit employees went on strike on September 24. The parties stipulated that from September 26 through October 29, the Respondent hired six replacements, none of whom were told by the Respondent at the time of hire whether their positions would be temporary or permanent. Martini stated in his pretrial affidavit, dated March 6, 1992, that he had not indicated to the strikers or to any of the union officials whether he considered the replacements to be permanent or temporary. He further stated:

In mid to late November, I *decided in my mind* that the replacement employees were learning the job and that I would retain them as permanent employees, so long as there was no substantial turnover. I did not tell anybody of my decision at that time. I decided to wait another month or two before I informed the replacement employees of my decision, but I wanted to assure myself that there would not be a large turnover before I assured employees that they could expect to remain with the Employer. [Emphasis added.]

The Respondent paid the replacements lower, non-contractual wage rates.<sup>6</sup>

<sup>1</sup> The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> 280 NLRB 597 (1986), petition for review denied 829 F.2d 458 (3d Cir. 1987).

<sup>3</sup> All dates are in 1990 unless otherwise indicated.

<sup>4</sup> Martini variously owned and consulted for the predecessor companies.

<sup>5</sup> The Respondent's medical benefits contribution was higher than the industry's rate, and the Respondent did not contribute to the Union's pension fund.

<sup>6</sup> The parties stipulated that until November 16 the Respondent paid the replacements "by hand-cut checks whereas employees prior

On October 4, the Respondent reinstated striker Viterbo Avila to his former position following his unconditional offer to return. The Respondent's foreman, Zurita, stated in his affidavit that Avila "needed the money" and that a union representative "had said it was okay for Viterbo to return to work." The parties stipulated that by the time of the hearing the Respondent had not offered reinstatement to any other of the strikers.

Later in October, DeSilva asked Martini whether the Company would take the strikers back under the expired contract's terms and conditions of employment. Martini responded that he would not take the strikers back until the parties reached settlement on a new collective-bargaining agreement. Martini, whose testimony concerning this conversation with DeSilva was credited by the judge, testified that he further explained to DeSilva that he did not want to find himself once again in a position where issues remained unresolved and the unit employees could commence another economic strike.

By letter dated November 9, the Union "restated" its October unconditional offer to return to work made on behalf of the striking employees. The Union stated:

All of the employees are prepared to return to work under the same terms and conditions of employment as existed under the expired contract, pending our negotiations of a Successor Agreement.

The Respondent's counsel, by letter dated November 29, denied that the Union had made an unconditional offer to return on October 16 or at any time prior to the November 9 letter. Counsel further asserted:

[O]ne of the striking employees had earlier offered to return to work and he in fact was reinstated. At the present time, however, all other striking employee's [sic] positions have been filled by permanent replacements. If you would like the strikers [sic] names placed on a preferential recall list in the event of any openings, please advise the undersigned.

This letter was clearly erroneous because the Respondent's counsel stipulated at the hearing that the replacements were temporary employees and that both the October and November offers constituted uncondi-

tional offers to return to work.<sup>7</sup> At the close of the hearing, the Respondent amended its answer to admit the complaint's allegation that in October Martini rejected the Union's unconditional offer to return made on behalf of the striking employees and conditioned reinstatement on the Union's acceptance of the Respondent's collective-bargaining proposals.

## 2. Analysis

### *a. The legitimacy of the Respondent's bargaining position and its timely declaration of a lockout in October*

An employer may refuse to reinstate economic strikers on their unconditional offer to return to work based on the "legitimate and substantial business reason" of a lawful economic lockout in support of a legitimate bargaining position. Further, absent specific proof of antiunion motivation, an employer has the right to hire temporary employees to engage in business operations during an otherwise lawful lockout.<sup>8</sup>

In this case, the General Counsel contends that the Union's October offer to return to work under the terms of the expired contract pending further negotiations constituted acceptance of the Respondent's proposed wage freeze because, in either case, the wage rate under the expired contract would apply. The General Counsel asserts that the Respondent's refusal to reinstate the strikers was therefore not in support of its bargaining position—which the Union had effectively accepted—but was motivated by antiunion sentiment.

We disagree with the General Counsel. We find that the Union's offer to work under the expired contract's terms pending further negotiations of an indeterminate length would not ensure that the existing wage rates would remain stable for 6 months, as proposed by the Respondent. Moreover, as Martini explained at the hearing, acceptance of the Union's offer would leave the Respondent vulnerable to another economic strike during the subsequent bargaining. From the Respondent's perspective, the resulting situation, therefore, would not place it in the same economic position as a complete agreement containing the no-strike clause the Respondent sought. Thus, the Respondent was privileged to engage in an economic lockout at that point.

Regarding the lawfulness of a claimed lockout, the Board in *Eads Transfer*<sup>9</sup> found that absent timely notification, an employer's failure based on a claimed

to the strike were paid by ADP checks." The Respondent's bookkeeper stated in her pretrial affidavit that because the Respondent did not know how long it would retain the replacements when it first hired them, taxes were not deducted from their pay. Thus, it can be inferred that the hand-cut checks, unlike the Respondent's customary payroll checks, did not provide for payroll deductions. It is not clear from the record when the Respondent began deducting taxes from the replacements' wages.

<sup>7</sup> The record does not reveal that the Respondent ever corrected the statement in its November 29 letter that it had hired permanent replacements, except to the extent that it stipulated at the hearing that the replacements were temporary employees. Thus, from November 29, 1990, until at least the date of the hearing, employees thought that they had been permanently replaced.

<sup>8</sup> *Harter I*, supra at 600.

<sup>9</sup> 304 NLRB 711 (1991), enfd. 989 F.2d 373 (9th Cir. 1993).

lockout to reinstate economic strikers on their unconditional offer to return to work is inherently destructive of employee *Laidlaw* rights<sup>10</sup> and violates Section 8(a)(3) and (1) of the Act. The Board, acknowledging and balancing the competing rights of economic strikers to reinstatement on their unconditional offer to return to work, and of employers to lock out and temporarily replace employees for legitimate economic or business reasons under *Harter I*, concluded that if the employer wanted to rely on *Harter* to suspend the strikers' reinstatement rights, "it was obligated to declare the lockout before or in immediate response to the strikers' unconditional offers to return to work."<sup>11</sup> Such timely notification is necessary, the Board reasoned, so that the strikers could fairly evaluate their bargaining position.<sup>12</sup>

Relying on *Eads*, the General Counsel maintains that at no time prior to the hearing did the Respondent actually state that "it had locked out employees," but created an after-the-fact defense to conform to the evidence. Contrary to the General Counsel, we agree with the Respondent's contention that a timely announcement of a lockout does not depend on an employer's use of formal words describing its bargaining tactics. Here, we find that the Respondent's assertion that it would not offer the strikers reinstatement until a new agreement was reached was sufficient to inform the striking employees that the employer was locking them out in support of its bargaining position.<sup>13</sup> Accordingly, we find that in October, the Respondent timely declared a lawful lockout in support of its legitimate bargaining demands.

#### b. Conduct inconsistent with a lawful lockout

Following a declaration of a lawful lockout, an employer that seeks to continue to invoke *Harter I* to justify its failure to reinstate striking employees on their

unconditional offer to return must refrain from engaging in conduct inconsistent with an economic lockout. Such inconsistent conduct ends the lawful lockout, and removes the employer's privilege of invoking *Harter I*. In *Field Bridge Associates*, for example, the Board adopted the judge's finding that the respondent's lawful lockout ended when the respondent offered reinstatement to only some of the strikers who had offered to return, thereby undermining its claim that the lockout was in support of its legitimate bargaining position. In the absence of a legitimate business justification, the Board ordered the respondent to reinstate all of the strikers who had unconditionally offered to return to work.<sup>14</sup>

In the instant case, the Respondent's counsel informed the Union by letter dated November 29 that the replacements were permanent employees. An employer's use of *permanent* replacements is inconsistent with a declared lawful lockout in support of its bargaining position.<sup>15</sup> Furthermore, in the November 29 letter the Respondent's counsel requested that the Union advise him if it wished that the strikers be placed on a preferential recall list. Such a statement is also inconsistent with Respondent's claim that it was refusing to allow employees to return to work at all, pursuant to a lawful lockout. Thus, at least as of the Respondent's November 29 letter, the lawful lockout was over. As in *Field Bridge Associates*, above, the Respondent has failed to demonstrate that it then had legitimate and substantial business reasons apart from the claimed lockout for refusing to reinstate the striking employees.<sup>16</sup> The Respondent was therefore obligated to offer reinstatement to all the strikers who had offered to return. Accordingly, we find that the Respondent's failure, based on a claimed lockout, to reinstate the strikers on their unconditional offer to return to work after it had announced that the replacements were permanent employees, is inherently destructive of employee rights under *Laidlaw Corp.*, above, and violates Section 8(a)(3) and (1).

<sup>10</sup>*Laidlaw Corp.*, 171 NLRB 1366 (1968), enf'd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

<sup>11</sup>304 NLRB at 713.

<sup>12</sup>The Respondent's statement, made immediately after the Union's initial offer to return, was timely under *Eads*. In this respect, as the judge noted, this case is distinguishable on its facts from *Eads*, where the Respondent waited almost 3 months after the initial offer to return to first declare a lockout.

<sup>13</sup>See *Field Bridge Associates*, 306 NLRB 322, 333-334 (1992), enf'd. 982 F.2d 845 (2d Cir. 1993), cert. denied 113 S.Ct. 2995 (1993), and *Eads Transfer*, above at 712, in which the employers also informed the striking employees that they would not be reinstated until a new contract was formed.

Contrast *F. W. Woolworth Co.*, 310 NLRB 1197, 1206 (1993) (by claiming an impasse and actually implementing its bargaining proposals concurrent with schedule reductions, the employer substantially undercut any available claim that the purpose of its lockout was in support of its bargaining demands); *Clemson Bros.*, 290 NLRB 944 (1988) (lockout violated Sec. 8(a)(3) where employer's purpose was to avoid COLA payments about which it refused to bargain in good faith; employer unlawfully conditioned reinstatement offers on strikers' waiving the right to receive benefits).

<sup>14</sup>304 NLRB at 334.

<sup>15</sup>See *Harter Equipment (Harter II)*, 293 NLRB 647, 648 (1989), in which the Board relied on the fact that the locked-out employees were not strikers and therefore could not lawfully be permanently replaced to find that they were entitled to vote in a decertification election.

See also Justice Goldberg's concurring opinion in *Brown Food Store*, 380 U.S. 278, 293 (1965), in which he expressed "grave doubts as to whether the act of locking out employees and hiring permanent replacements is justified by any legitimate interest of the nonstruck employers."

<sup>16</sup>For example, there is no evidence that any of the strikers had been permanently replaced before the lockout began, and that any of the permanent replacements were still employed when the lockout ended. In this regard, we note Martini's testimony in his pretrial affidavit that he first decided in mid- to late November—after the lockout began—that the replacements were permanent employees.

In reaching this conclusion, we recognize and adopt the judge's finding that the Respondent was not motivated by union animus.<sup>17</sup> We also acknowledge the Respondent's counsel's stipulation at the hearing that the replacements were temporary employees. We emphasize, however, that the determinative issue before us is whether the Respondent's conduct was consistent with the requirements of a lawful lockout and not whether the replacements were "permanent" or "temporary" employees.<sup>18</sup> Thus, we similarly reject the Respondent's contention that the facts and circumstances surrounding the hiring of the replacements, and not its counsel's November 29 characterization of them as "permanent" should determine their legal status. Regardless of the actual status of the replacements, this case, like *Eads*, above, concerns the obligations of an employer that seeks to invoke *Harter I* to justify its failure to reinstate economic strikers on their unconditional offers to return. As discussed in *Eads*, an employer's conduct throughout the lockout must be consistent with the advancement of its legitimate bargaining position so that the employees are able to "knowingly reevaluate their position."<sup>19</sup> In *Eads*, the employees could not intelligently evaluate their position because the employer did not inform them that they would be reinstated as soon as they yielded to the employer's bargaining demands. In the instant case, the employees could not intelligently evaluate their position because the Respondent indicated to them (incorrectly in law) that they would remain replaced even if they yielded to the Respondent's bargaining demands. The Respondent's November 29 announcement, like the employer's untimely declaration of a lockout in *Eads*, could have reasonably caused the strikers confusion in evaluating their bargaining strength.<sup>20</sup> Thus, for

at least 21 months (i.e., from the Respondent's November 29 letter to the date of the hearing) the employees were in the dark about their status. Accordingly, for the reasons set forth above, we find that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the strikers on and after November 29.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent, inter alia, to offer the strikers full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed, and make them whole for any losses suffered as a result of the discrimination against them from November 29, 1990. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER

The National Labor Relations Board orders that the Respondent, Ankor Concepts, Inc., Yonkers, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) On the cessation of the lockout, failing and refusing without justification to reinstate economic strikers on their unconditional offer to return to work.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Raul Arango, Hector Cotto, Fernando Picherdo, Raphael Placencio, and Gabriel Vargas full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Raul Arango, Hector Cotto, Fernando Picherdo, Raphael Placencio, and Gabriel Vargas whole for any loss of earnings and benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security pay-

work. Additionally, unlike *Schenk Packing Co.*, 301 NLRB 487, 489-490 (1991), there is no contention here that the Respondent unlawfully conditioned replacement on Avila's resignation from the Union.

<sup>17</sup> The Supreme Court has found that where, as here, unlawful conduct is inherently destructive of employee rights, it may be proscribed without an affirmative showing of an unlawful motive. As the Court explained, such inherently destructive conduct carries with it "unavoidable consequences which the employer not only foresaw but which [it] must have intended" and thus bears "its own indicia of intent." *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967), citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228, 231 (1963).

<sup>18</sup> Cf. *Goldsmith Motors Corp.*, 310 NLRB 1279, 1284 (1993) (Complaint dismissed and lockout found to be lawful where the General Counsel failed to prove with sufficient clarity that the employer hired permanent rather than temporary replacements; the judge found based on credibility that the employer told most of the replacements about the labor dispute and that their jobs were temporary).

<sup>19</sup> *Eads*, 304 NLRB at 712.

<sup>20</sup> In finding that the Respondent's conduct was not consistent with a lawful lockout, we do not rely on the fact that the Respondent permitted striker Avila to return to work shortly after the strike began. The evidence demonstrates that the Union consented to his return. When Avila returned to work, none of the other strikers had yet offered to return. Thus, Avila's reinstatement stands in contrast to those in *Field Bridge Associates*, 306 NLRB at 333-334, where the employer ended its lawful lockout by offering reinstatement to only some of the strikers who had made unconditional offers to return to

ment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Yonkers, New York, copies of the attached notice marked "Appendix."<sup>21</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since November 9, 1990.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>21</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT, on the cessation of the lockout, fail and refuse without justification to reinstate economic strikers on their unconditional offer to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer Raul Arango, Hector Cotto, Fernando Picherdo, Raphael Placencio, and Gabriel Vargas full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Raul Arango, Hector Cotto, Fernando Picherdo, Raphael Placencio, and Gabriel Vargas whole for any loss of earnings and benefits they may have suffered by reason of our unlawful refusal to reinstate them, plus interest.

ANCOR CONCEPTS, INC.

*Belinda Lerner, Esq.*, for the General Counsel.  
*Michael Delikat, Esq. (Orrick, Herrington & Sutcliffe)*, of  
New York, New York, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City on September 9, 1992. On a charge filed on November 9, 1990, a complaint was issued on March 25, 1992, alleging that Ancor Concepts, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by refusing to reinstate striking employees. Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

##### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a New York corporation with an office and place of business in Yonkers, New York, has been engaged in the manufacture and nonretail sale of residential furniture. It annually sells and ships from its facility goods valued in excess of \$50,000 directly to points located outside the State of New York. Respondent admits and I so find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted and I so find that Amalgamated Industrial Union, Local 76B, International Union of Electrical Workers, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Background

Respondent Ankor Concepts, Inc. was formed in March 1990 by its owner and president, Ronald Martini. From 1970 to 1988 the Company had operated under the name Ankor Concepts Limited. From 1970 until September 1990 Respondent and its predecessor corporations maintained a continual relationship with the Union. According to Union Business Agent Elmo DeSilva, Martini never displayed any antiunion animus or hostility towards the Union.

The Union has been the designated exclusive collective-bargaining representative of Respondent's production and maintenance employees and has been recognized as the representative by Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from September 1, 1987, until August 31, 1990.<sup>1</sup> In August three meetings took place between union representatives and Respondent concerning a new collective-bargaining agreement to succeed the agreement which was to expire on August 31. At the first meeting, held on August 7, DeSilva proposed a sick day and an increase in wages. Martini, on the other hand, proposed a wage freeze for 6 months. At the second meeting, held on August 22, Martini stated that he could go along with the medical and insurance proposals but that he could not give an additional sick day and he needed a 6-month moratorium on wages. The third meeting took place on August 28. Wages and a holiday were again discussed and Martini stated, "[H]e couldn't afford to do it and he needed a six month moratorium."<sup>2</sup> On September 20, Union President Carrion and Pietri met with Martini. Martini again stated that he could not afford a wage increase and that he would need an additional 6 months. Carrion and Pietri then reported the results of the meeting to the membership. The membership voted to strike and a strike commenced on September 24.

### B. Offer to Return to Work

At the hearing, both counsel for General Counsel and counsel for Respondent stated that after the strike began Respondent hired temporary replacements. In addition, counsel stipulated that "in October 1990 Union representative Elmo DeSilva asked Ronald Martini whether the company would be willing to take back the strikers on the same terms and conditions of employment as existed under the expired collective-bargaining agreement. Martini stated he would not take the strikers back until a settlement on a new collective-bargaining agreement was reached." Counsel also stipulated that "by letter dated November 9, 1990, the Union on behalf of the remaining striking employees made an unconditional offer to return to work." At the hearing, Respondent's counsel amended its answer and admitted paragraph 8(a) of the complaint, which stated that on October 16 Martini rejected the Union's offer, on behalf of the striking employees, of

their unconditional return to work, and "conditioned the reinstatement of the striking Unit employees on the Union's acceptance of Respondent's collective-bargaining proposal." It has thus been stipulated that after the strike began Respondent hired temporary replacements, that on October 16 and on November 9 the Union, on behalf of the striking employees, offered unconditionally to return to work, and that Respondent rejected the Union's offer and conditioned the reinstatement of the striking employees "on the Union's acceptance of Respondent's collective-bargaining proposal."<sup>3</sup>

### Discussion and Conclusions

In *Harter Equipment*, 280 NLRB 597 (1986), affd. 829 F.2d 458 (3d Cir. 1987), the Board stated:

Absent specific proof of antiunion motivation, an employer does not violate Section 8(a)(3) and (1) by hiring temporary replacements in order to engage in business operations during an otherwise lawful lockout.

Counsel for both General Counsel and Respondent agreed that Respondent hired temporary replacements. From 1970 until September 1990, Respondent and its predecessor corporations maintained a continual relationship with the Union. DeSilva conceded that Martini never displayed any union animus or hostility towards the Union. In *Harter*, the Board stated, with respect to the respondent in that proceeding (280 NLRB at 597):

There is no evidence that the Respondent was motivated by a specific union animus. On the contrary, the bargaining history between the Respondent and the Union shows that the relations have been amicable. Further, there is no evidence that the Respondent engaged in bad-faith bargaining before or after the lockout.

The very same can be said of the Respondent in this proceeding. There is nothing in this record to indicate that the bargaining history between Respondent and the Union has been anything but amicable. In addition, there is no evidence in the record that the Respondent engaged in bad-faith bargaining. Accordingly, I find that General Counsel has not shown "specific proof of antiunion motivation" by Respondent in this proceeding.

While conceding that *Harter* generally applies, citing *Eads Transfer*, 304 NLRB 711 (1991), General Counsel argues that in the instant proceeding Respondent should be found to have violated the Act. I believe, however, that *Eads* is distinguishable. In *Eads*, it was more than 2 months after the initial offer to return that respondent announced for the first time that it was not prepared to reinstate the strikers until a

<sup>1</sup> All dates refer to 1990 unless otherwise specified.

<sup>2</sup> Martini testified that the parties reached an agreement at that meeting. I credit DeSilva's testimony that no agreement was reached. This was corroborated by Isabel Pietri, a union business representative, who testified that DeSilva advised Martini that any moratorium had to be approved by the union president and by the membership.

<sup>3</sup> DeSilva testified that after he made the unconditional offer on October 16, Martini responded that he was "angry" at the strikers and he "didn't want them back." Martini, on the other hand, testified that he told DeSilva "until I have an agreement I am not going to bring any of the employees back." I must credit Martini's testimony. Par. 8(a) of the complaint specifically states that Respondent conditioned the reinstatement of the strikers on the Union's acceptance of Respondent's collective-bargaining proposal. In addition, as noted above, counsel stipulated that Martini stated, "[H]e would not take the strikers back until a settlement on a new collective-bargaining agreement was reached."

contract was reached. In the instant proceeding, however, counsel for the parties stipulated that when the initial offer to return was made by De Silva in October, Martini stated, "He would not take the strikers back until a settlement on a new collective-bargaining agreement was reached." For the above reasons, I find that Respondent did not violate Section 8(a)(1) and (3) of the Act. Accordingly, the allegations are dismissed.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
  2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
  3. Respondent has not engaged in the unfair labor practices alleged in the complaint.
- [Recommended Order for dismissal omitted from publication.]